Supreme Court, U.S.
FILED
DEC 21 1993

No. 93-575

In The

Supreme Court of the United States

October Term, 1993

THE STATE OF IDAHO, MACK W. RICHARDSON, Director of the Department of Law Enforcement, and DOES I through V,

Petitioners,

v.

JOSEPH P. ARNZEN,

Respondent.

Petition For A Writ Of Certiorari To The Idaho Supreme Court

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE ISSUES RAISED BY PETITIONERS DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI 3

II. CLAIMS BY PETITIONERS STATE OF IDAHO AND MACK RICHARDSON IN HIS OFFICIAL CAPACITY THAT THE IDAHO SUPREME COURT IMPROPERLY INTERPRETED FEDERAL LAW DO NOT PRESENT A LIVE CONTROVERSY FOR REVIEW 3

III. THE ISSUE OF WHETHER DEFENDANT MACK RICHARDSON IN HIS INDIVIDUAL CAPACITY VIOLATED ARNZEN'S DUE PROCESS RIGHTS TURNED ON INTERPRETATION OF STATE STATUTES AND REGULATIONS AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW 7

IV. THE IDAHO SUPREME COURT'S HOLDING DOES NOT CONFLICT WITH FEDERAL 9TH CIRCUIT COURT OF APPEALS' RULINGS AND THERE IS NO FEDERAL QUESTION PRESENTED FOR REVIEW 12

V. THE IDAHO SUPREME COURT DID NOT ERR IN FINDING THAT DEFENDANT MACK RICHARDSON'S ACTIONS VIOLATED CLEARLY ESTABLISHED LAW 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Arnzen v. State of Idaho, 854 P.2d 242 (Idaho 1993) . . *passim*

Barthuli v. Board of Trustees, 434 U.S. 1337 (1977) 4

Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976) 12, 13

Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985) . . . . . *passim*

Coleman v. Thompson, 111 S.Ct. 2546 (1991) 4

Correa v. Nampa School District No. 131, 645 F.2d 814 (9th Cir. 1981) 13

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 4

Harlow v. Fitzgerald, 457 U.S. 800 (1981) 14

Honig v. Doe, 484 U.S. 305 (1988) 4

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 7

Owsley v. Peyton, 352 F.2d 804 (4th Cir. 1965) 13

Missouri ex rel. Hurwitz v. North, 271 U.S. 40 (1926) 7

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 11

U.S. ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970) 13

Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) 7

Winona & St. Peter R.R. Co. v. Town of Plainview, 143 U.S. 371 (1891) 13

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 5

TABLE OF AUTHORITIES

Page

STATUTES AND REGULATIONS:

28 U.S.C. § 1257 4

Idaho Code § 67-5315(1) 15

Idaho Code § 67-5315(2) 10, 12

28 IDAPA § 19.A.5.a 11, 15

28 IDAPA § 20.A.2 12

CONSTITUTION OF THE UNITED STATES:

U.S. Const. art. II § 2 3

U.S. Const. amend XI 5

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Sup.Ct.R. 10.1 3

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BRIEF IN OPPOSITION

The respondent, Joseph P. Arnzen, respectfully prays that the Petition for Writ of Certiorari filed by petitioners to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decisions delivered in the proceedings below.

STATEMENT OF THE CASE

The statement of the case set forth by the petitioners is more or less accurate except for one glaring misstatement. Petitioners state that "in order to commence the discharge process, Petitioner Mack Richardson drafted a letter, dated November 3, 1989, advising Arnzen that because of his criminal conviction, the Department intended to seek dismissal". Petition at 6. Richardson in fact, and the record so reflects, did not intend to "seek" respondent's dismissal, but in fact, had decided to terminate Joseph P. Arnzen's position with the Idaho State Police. The letter of termination drafted by Richardson specifically stated that Richardson was terminating Arnzen's employment as corporal with the Idaho State Police, not merely "seeking" to or "considering" termination. *See* Petition at Appendix A, p. 13, n. 2. Thus, the position of Richardson was not that Arnzen faced termination proceedings with notice and opportunity to be heard, the position was that Arnzen must resign or be fired.

The petitioners allege that Richardson was going to merely institute a *process* to begin discharge proceedings. That is simply not what the record reflects by virtue of the November 3, 1989, letter from Richardson to Arnzen. This is borne out by findings of the Idaho Supreme Court who found that Arnzen's supervisor, Ron Moore, advised Arnzen that if he refused to resign, he would be fired. *See* Petition at Appendix A, p. 4. At no point does the record reflect that Arnzen was informed that a "process" would commence. It is obvious why petitioners want to now characterize the facts of this case as one of "beginning" a discharge process as opposed to a termination on November 3, 1989.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE ISSUES RAISED BY PETITIONERS DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI.

Rule 10.1 of the Rules of the United States Supreme Court provides for granting a petition for a writ of certiorari only when special and important reasons exist for review. The authority cited by petitioners to support review of the decision of the Idaho Supreme Court fails to satisfy the requisite of Rule 10.1(a) and (b) of the Rules of the United States Supreme Court. The Idaho Supreme Court decision in this case is consistent with decisions of the United States Supreme Court as well as Federal Circuit Courts.

In sum, the issues raised by petitioners are not of such significance or import as to require review by the United States Supreme Court. Thus, respondent respectfully requests that the Petition be denied.

II.

CLAIMS BY PETITIONERS STATE OF IDAHO AND MACK RICHARDSON IN HIS OFFICIAL CAPACITY THAT THE IDAHO SUPREME COURT IMPROPERLY INTERPRETED FEDERAL LAW DO NOT PRESENT A LIVE CONTROVERSY FOR REVIEW.

The judicial power of the United States extends only to cases and controversies. U.S. Const. art. II § 2. To obtain jurisdiction, there must be an actual controversy

over an issue and not just a desire for an abstract declaration of law. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *reh'g denied*, 439 U.S. 883 (1978).

The controversy must be one which requires a declaration of the parties' rights as they stand at the time of appellate determination. *Barthuli v. Board of Trustees*, 434 U.S. 1337 (1977). The fact that a live controversy existed at the time the lawsuit was filed cannot substitute for the actual case or controversy required for jurisdiction. *Honig v. Doe*, 484 U.S. 305 (1988). When this Court reviews a state court decision pursuant to 28 U.S.C. § 1257, the Supreme Court is reviewing the judgment. If resolution of a federal question would not affect the judgment, there is no question for the Court to address. *Coleman v. Thompson*, 111 S.Ct. 2546 (1991).

The petitioners named in the Petition for Writ of Certiorari are the State of Idaho and Mack Richardson in his official and individual capacity. *See* Petition at 1. It is undisputed that the Idaho Supreme Court affirmed the trial court's complete dismissal of Arnzen's claims against the State of Idaho and Mack Richardson in his official capacity. *See Arnzen v. State of Idaho*, 854 P.2d 242 (Idaho 1993) (reprinted at Appendix A1-20 to Petition).

It is apparent from the petition that petitioners State of Idaho and Mack Richardson in his official capacity have joined for the sole ultimate purpose of seeking an advisory opinion regarding the Idaho Supreme Court's treatment of *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), the exhaustion of remedies defense and the constitutionality of Idaho's administrative procedures for state employee grievances. Since the Idaho Supreme Court

completely dismissed the State of Idaho and Mack Richardson in his offical capacity from the case, this Court is without the ability to provide these petitioners any further relief as action by this Court would not affect the judgment with respect to them.

Further, the Idaho Supreme Court's interpretation of *Loudermill* was limited to the discussion of Mack Richardson's qualified immunity as an *individual* defendant. The Idaho Supreme Court did not apply or even discuss *Loudermill* in affirming the dismissal of claims against the State of Idaho and Mack Richardson in his official capacity as no application of *Loudermill* was necessary. *See Arnzen*, 854 P.2d at 246-47. Dismissal of Arnzen's claims against these petitioners was undertaken in reliance on this Court's holding in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) and the Eleventh Amendment to the United States Constitution. *See Arnzen*, 854 P.2d at 246-47.

With respect to the question of exhaustion of administrative remedies, the Idaho Supreme Court did not address this issue with respect to the due process claims against petitioners State of Idaho and Mack Richardson in his official capacity, and this question was not presented on appeal below. *See Arnzen*, 854 P.2d at 246. The exhaustion defense was utilized only to affirm the trial court's grant of summary judgment dismissal of Arnzen's state law wrongful discharge claims. *Id.* at 249-50. Again, it was not necessary for the Idaho Supreme Court to consider the exhaustion defense in the context of due process claims against the State of Idaho and Mack Richardson in his official capacity because a complete dismissal was afforded under *Will*.

Petitioner State of Idaho further attempts to entice this Court to grant review by raising the specter of the potential invalidity of Idaho's administrative regulations and statutes relating to state employee disciplinary procedures under the Idaho Supreme Court's ruling. *See* Petition at 13. This argument is entirely meritless and simply does not present a justiciable controversy for adjudication with respect to petitioners State of Idaho and Mack Richardson in his official capacity.

It is undisputed, based upon the record below, that the constitutionality of the state regulations and statutes in question was never addressed by the Idaho Supreme Court or challenged by Arnzen. In fact, far from implicating constitutional infirmities, the Idaho Supreme Court relied on the existence of the procedures as an additional ground for dismissal of wrongful discharge claims against the State of Idaho and Mack Richardson in his official as well as individual capacity. *See Arnzen*, 854 P.2d at 249-50.

The constitutionality of the regulations and statutes is not an issue with respect to the remaining petitioner, Mack Richardson in his individual capacity.

There is no live controversy between respondent and petitioners State of Idaho and Mack Richardson in his official capacity. The Idaho Supreme Court's action in affirming the trial court's summary judgment rendered all issues as to these petitioners moot. Accordingly, the writ of certiorari should be denied to petitioners State of Idaho and Mack Richardson in his official capacity.

III.

THE ISSUE OF WHETHER DEFENDANT MACK RICHARDSON IN HIS INDIVIDUAL CAPACITY VIOLATED ARNZEN'S DUE PROCESS RIGHTS TURNED ON INTERPRETATION OF STATE STATUTES AND REGULATIONS AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

The interpretation of state law by the highest state court in that state is binding on the United States Supreme Court and does not present a federal question for review. *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468 (1989); *Missouri ex rel. Hurwitz v. North,* 271 U.S. 40 (1926).

In *Landmark Communications, Inc., v. Virginia,* 435 U.S. 829 (1978), this Court discussed this well-settled rule in a controversy involving interpretation of a state statute, wherein this court stated:

> Landmark argued below that the [state] statute was unclear. . . . The Supreme Court of Virginia . . . construed the statutory language so as to encompass appellant. Although a contrary statutory construction might well save the statute from constitutional invalidity, *"it is not our function to construe a state statute contrary to the construction given it by the highest court of a State." O'Brien v. Skinner,* 414 U.S. 524, 531, ...

Landmark, 435 U.S. at 829 n. 9 (emphasis added).

Petitioners ask this Court to grant review in the instant case because:

> In the Idaho Supreme Court's May 13, 1993 opinion, it was concluded, as a matter of law, that Plaintiff Joseph Arnzen's constitutional

> right to procedural due process was violated. *See* 854 P.2d at 248. . . . The basis of the ruling was the conclusion [Arnzen's] right to continued public employment was impaired when Defendant Mack Richardson drafted a letter notifying Arnzen that the Department . . . intended to seek his dismissal.
>
> * * *
>
> In order to support its conclusions, the Idaho Supreme Court improperly expanded federal law to require notice and hearing under *Loudermill, before a decision is made to institute termination proceedings.*

Petition at 7, 13 (emphasis added).

On examination of the *Arnzen* decision and the Idaho Supreme Court's application of *Loudermill* to the issue of qualified immunity, it is abundantly clear that the court did not improperly expand federal law and that the ultimate question turned on interpretation of state law.

The first prong of the qualified immunity test required the Idaho Supreme Court to determine whether there was a clearly established law Richardson as an individual violated. The Idaho Supreme Court applied *Loudermill* as follows:

> It was equally well-established that due process requires, at a minimum, notice of the contemplated action and notice of the basis and evidence relied upon for the contemplated action, and an opportunity to respond. The first component of the due process requirement, notice, may be an oral or written notification of the charges against the employee and the basis and evidence supporting those charges. The second

> component of the due process requirement, opportunity to respond, is an opportunity for the employee, either in person or in writing, to present his or her reasons "why *proposed* action should not be taken. . . . "

Arnzen, 854 P.2d at 247 (emphasis in original, citations omitted). There is no allegation by petitioners that the foregoing statements of the Idaho Supreme Court regarding *Loudermill* are in any manner improper or incorrect as to the requirements of notice and hearing prior to termination.

Following the Idaho Supreme Court's discussion of *Loudermill* as set forth above, the Idaho Supreme Court reached the conclusion the petitioners are now alleging was improper:

> Of course, as our emphasis indicates, the opportunity to respond must take place before the administrative action occurs. More specifically, Arnzen must have been given an opportunity to respond to charges against him before the State made the decision to terminate him from employment with the Department.

Arnzen, 854 P.2d at 247 (citations omitted). The conclusion that notice and opportunity to be heard occur *prior* to termination is consistent with this Court's holding in *Loudermill*. As noted by petitioners, this Court recognized in *Loudermill* that a tenured public employee should be given the opportunity to "invoke the discretion of the decision maker . . . *before* the termination takes effect." *Loudermill*, 470 U.S. at 543 (emphasis added); *see also*, Petition at 12.

The Idaho Supreme Court properly turned its focus to determination of the point in time when termination took effect, finding that the decision to terminate Arnzen occurred on November 3, 1989. *Arnzen*, 854 P.2d at 248. This was the date Mack Richardson drafted the termination letter, the date Ron Moore, Arnzen's immediate supervisor, was advised by the "Boise office" to tell Arnzen he could resign or be terminated, the date Ron Moore told Arnzen "if he refused to resign, he would be fired", and the date that Ron Moore told Arnzen that filing a grievance would be a futile act and that "you know they are never giving you your job back." *Arnzen*, 854 P.2d at 244-45.

Determination of the effective date of termination for a classified public employee in Idaho is a question addressed solely by state law, which is admitted by petitioners. *See* Idaho Code § 67-5315(2) (1989) (reprinted at Appendix A30-31 of Petition); *also* Petition at 10 ("[U]nder the procedural protections provided by state law, Arnzen's dismissal was not final when the November 3rd letter was signed.") While Idaho Code § 67-5315(2) provides that disciplinary actions shall not be "effective" until the employee has the opportunity to complete administrative grievance procedures, the Idaho Supreme Court interpreted the facts of the instant case and Idaho law to conclude that petitioner Mack Richardson's actions amounted to termination of Arnzen on November 3, 1989, so as to effectively preclude pre-termination invocation of the decision maker's discretion.

Petitioners' attempts to characterize their November 3, 1989, conduct as inchoate by use of the terms "proposed",

"contemplated", as an "inten[t] to seek [Arnzen's] dismissal", or "institut[ion] of discharge proceedings", ignore the facts in the record and the Idaho Supreme Court's decision based upon state law. *See* Petition at 6, 7, 8 at n. 1, 9. There was nothing "proposed" about Richardson's decision to terminate Arnzen. *See Arnzen*, 854 P.2d at 248, n. 2 ("I am terminating your employment. . . . "). There was a substantial factual basis for the Idaho Supreme Court to find from Mack Richardson's November 3, 1989, letter, and conduct and statements by Ron Moore that the decision to terminate was "effective" on that date. Ordinarily, the United States Supreme Court will not grant certiorari merely to review evidence or inferences drawn therefrom. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

Further, the Idaho Supreme Court could have found that the first prong of the qualified immunity was not met due to Mack Richardson's failure to follow Idaho administrative Procedures. Petitioners have as much as admitted that state procedures were violated wherein petitioners state:

> Under the Idaho Personnel Commission Act, Idaho Code § 67-5301, *et seq.*, and . . . regulations of the Idaho Personnel Commission, *state agencies are required to provide an employee written notice of contemplated disciplinary action*, which must outline the nature of the charges, the discipline sought, and a brief explanation of the evidence the employer is considering. *See* 28 IDAPA § 19.A.5.a. *The termination letter in the present case is the notice mandated by the Personnel Commission.*

Petition at 8 n. 1 (emphasis added).

Petitioners rely on Mack Richardson's November 3rd letter as the notice mandated under the regulation. However, it is undisputed that this letter was never presented to Arnzen. Richardson opted instead to send Ron Moore to threaten Arnzen with termination if Arnzen did not immediately resign. *See Arnzen*, 854 P.2d at 244-45. Even if the letter had been sent, it violated Idaho Code § 67-5315(2) and 28 IDAPA § 20.A.2, as the letter provided that the termination was "effective" November 6, 1989, three (3) days from the date of the letter. *See Arnzen*, 854 P.2d at 248, n. 2. Under the administrative grievance procedure and petitioners' theory, the termination could not have been effective until a minimum of five (5) days following the time Arnzen was notified of a grievable matter. *See* 28 IDAPA § 20.A.2 (reprinted at Appendix A38-51 to Petition).

The Idaho Supreme Court correctly interpreted *Loudermill*. In addition, the ultimate issue of which petitioners complain turned on the Idaho Supreme Court's interpretation of Idaho statutes and administrative regulations. There is no substantial federal question for review presented in the petition.

IV.

THE IDAHO SUPREME COURT'S HOLDING DOES NOT CONFLICT WITH FEDERAL 9TH CIRCUIT COURT OF APPEALS' RULINGS AND THERE IS NO FEDERAL QUESTION PRESENTED FOR REVIEW.

Petitioners' arguments that review should be granted due to an alleged conflict between the Idaho Supreme Court in *Arnzen* and the courts in *Bignall v. North Idaho*

College, 538 F.2d 243 (9th Cir. 1976) and *Correa v. Nampa School District No. 131*, 645 F.2d 814 (9th Cir. 1981), are without merit and do not present a substantial federal question for review.

Petitioners' arguments regarding exhaustion of administrative remedies discussed in *Bignall* and *Correa* can only apply to exhaustion of *pre-termination* remedies in the instant case. Arnzen was a classified state employee with a vested property interest in continued employment and thus entitled to notice and hearing prior to termination. *See Arnzen*, 854 P.2d at 247-48. If the final decision to terminate was effective on November 3, 1989, which was the implicit if not the express decision of the Idaho Supreme Court under Idaho law, the availability of post-termination grievance procedures is irrelevant to the issue of qualified immunity.

In addition, even assuming arguendo a conflict did exist in the holdings of the Idaho Supreme Court and federal Ninth Circuit Court of Appeals' rulings, it is well settled that state courts are not bound to follow decisions of lower federal courts on questions of federal law. *See, e.g., U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Owlsey v. Peyton*, 352 F.2d 804 (4th Cir. 1965). Failure of a state court to follow a lower federal court's interpretation of federal law does not present a federal question for review. *Winona & St. Peter R.R. Co. v. Town of Plainview*, 143 U.S. 371, 390 (1891).

Therefore, there are no substantial federal questions for review presented by petitioners with respect to this issue.

V.

THE IDAHO SUPREME COURT DID NOT ERR IN FINDING THAT DEFENDANT MACK RICHARDSON'S ACTIONS VIOLATED CLEARLY ESTABLISHED LAW.

Petitioners seek review of the Idaho Supreme Court's decision on grounds that the Idaho Supreme Court erred in finding that the petitioner Mack Richardson in his individual capacity violated clearly established law. *See* Petition at 17.

Petitioners argue that defendant Mack Richardson had qualified immunity because Idaho *tort law* regarding claims of coerced constructive discharge was unsettled at the time of the termination. *See* Petition at 19-20. Petitioners also rely on the assertion that the issue of whether a due process violation occurs when an employee is given the "option" to resign prior to termination had not been decided by this Court. *See* Petition at 20.

These arguments are specious and do not present a substantial federal question justifying a grant of review in the instant case.

Whether Mack Richardson's actions violated state common law regarding wrongful discharge claims is irrelevant to the constitutional due process inquiry in the instant case. The proper inquiry under *Harlow v. Fitzgerald*, 457 U.S. 800 (1981), undertaken by the Idaho Supreme Court, focuses on whether Richardson violated *"clearly established statutory or constitutional rights* of which a reasonable person would have known." *Harlow*, 457 U.S. at 818 (emphasis added).

In the instant case Arnzen did have clearly established constitutional, statutory and administrative rights which, based on the record before this Court, were violated.

It is undisputed on the record that Arnzen was a classified state employee under Idaho statutes and common law. Such an employee could only be terminated for cause, and with the right of notice and opportunity to be heard prior to termination. *Arnzen,* 854 P.2d at 247-249.

Further, as a classified employee, it is undisputed that Arnzen was entitled to the rights and benefits of Idaho statutes and regulations governing disciplinary actions and grievance resolution. *See* Idaho Code § 67-5315(1) (reprinted at Appendix A30 to Petition). Petitioners have admitted that Idaho law provided the procedural mechanism by which respondent could be disciplined and that respondent was entitled to, at a minimum, written notice of the "contemplated" discipline. *See* Petition at 8, n. 1; *also* 28 IDAPA § 19.A.5.a (reprinted at Petition, p. 3).

Nothing in 28 IDAPA § 19.A.5.a, pointed to by petitioners as mandatory on them, authorized Richardson to notify Arnzen of the decision to terminate his employment orally. Further, nothing in the procedures allowed Richardson to implement an "effective" termination less than at least five (5) days after notice of the decision to terminate. Nothing in Idaho law and procedures empowered Richardson, once disciplinary action was contemplated, to ignore the written notice provisions of 28 IDAPA § 19.A.5.a and instead send agency personnel to meet with Arnzen and command that Arnzen resign or

face termination. Nothing in the state administrative procedures empowered Richardson to, on behalf of the State of Idaho, provide Arnzen an "option" to resign under threat of immediate termination. Nothing in the state administrative procedures authorized Richardson or Ron Moore to dissuade Arnzen from filing a grievance by convincing him the action would be futile.

Petitioner Mack Richardson in his individual capacity cannot create a substantial federal issue for review where the undisputed facts show that he did not even follow clearly established state administrative procedures designed to protect respondent's rights as a classified state employee. State procedures were clear, just as it is clear those procedures applied to respondent as a classified state employee. It is equally clear that the procedures were not followed.

Therefore, the petition should be denied.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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